STATE OF WISCONSIN
IN SUPREME COURT
APPEAL NO. 2022AP000937

LEGEND LAKE PROPERTY OWNERS ASSOCIATION, INC.,

Plaintiff-Appellant,

v.

GUY KESHENA and
THE MENOMINEE INDIAN TRIBE OF WISCONSIN,

Defendants-Respondents.

REPLY BRIEF OF PLAINTIFF-APPELLANT

On Appeal from the Circuit Court for Menominee County,
The Honorable Katherine Sloma, Presiding
Circuit Court Case No. 2018CV000007

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Argument

I. The Restrictive Covenants' non-transfer provisions can be validly severed from the transfer provisions.

The Tribe and Keshena's short argument that "LLPOA did not argue in the circuit court that the transfer and tax roll provisions could be severed from the non-transfer portions" is a non-starter. *See* Resp. Br. 7. This could not possibly constitute waiver of an argument regarding severance, because at the time of the circuit court proceedings, the issue of preclusion of only the transfer restrictions had not yet arisen. *Legend Lake Property Owners Association, Inc. v. Midwest Regional Director, Bureau of Indian Affairs*, 68 Interior Dec. 284 (IBIA March 24, 2023); *Legend Lake Property Owners Association, Inc. v. United States Department of the Interior*, No. 23-C-480, 2024 WL 449287 (E.D. Wis. Feb 6, 2024); R.161, Tr. of March 22, 2022 Oral Ruling, A-App. 260.

The municipal and LLPOA rules and regulations language in the Restrictive Covenants is not a transfer restriction and can be severed from the actual transfer restrictions. The Tribe and Keshena's argument is limited to pointing out that the language is in subparagraph 1.D located under the heading "Restriction on Transfer." However, the language clearly states that it applies "notwithstanding a transfer...." R.1, Compl. 14, A-App. 016. The Restrictive Covenants also state:

> Paragraph Headings. The headings in this document are for purposes of convenience and ease of reference only and shall not be construed to limit or otherwise affect the meaning of any part of this document.

R.1, Compl. 16, A-App. 018. And contrary to the Tribe and Keshena's argument, the District Court did not specifically address Section 1.D in its analysis of its preemption decision holding. *See* Resp. Br. 7.

The remaining non-transfer provisions can also be severed. It is true that the Restrictive Covenants explicitly did not apply to lands already

"owned by any sovereign or dependent sovereign nation" as of 2009, however, they do *not* exclude lands that transfer *after* the Restrictive Covenants were in effect. R.1, Compl. 13, A-App. 015. To the contrary, Section 1.D explicitly provides for what happens when a property does transfer after the Restrictive Covenants were in effect: the real estate will remain subject to municipal and association rules. R.1, Compl. 14, A-App. 016.

The Tribe and Keshena have provided their own interpretation of the "primary purpose" of the Restrictive Covenants, which they argue, without citation, was to "defeat" part of the Restoration Act. Resp. Br. 8. However, the place to look for the intent of the Restrictive Covenants is the document itself:

> These Restrictive Covenants are intended to preserve the tax base of Menominee County, Wisconsin. These Restrictive Covenants are further intended to, among other things, increase property values of Legend Lake properties by insuring compliance with state and local municipal control and governance, and to assure compliance with membership responsibilities of the Legend Lake Property Owners Association, Inc. (hereinafter, the "Association").

R.1, Compl. 13, A-App. 015. This shows that complying with municipal and Association rules was part of the "primary purpose" of the Restrictive Covenants. The *Simenstad* and *Baierl* cases cited by the Tribe and Keshena do not require any different conclusion. *See* Resp. Br. 7.

II. The Restrictive Covenants' non-transfer provisions are enforceable and are not preempted.

The non-transfer provisions do not violate the Restoration Act or public policy. *See* Resp. Br. 8. The Tribe and Keshena do not establish why the LLPOA's past construction of the By-Laws to exclude trust lands from voting membership has anything to do with public policy. The Tribe and Keshena claim "discrimination" but there is no accusation that LLPOA

discriminates against tribal members who own lots that are *not* trust lands. The Tribe and Keshena also do not explain how voting for trust lots owned, not by the resident, but by the United States in trust for the Tribe, would work, nor do they establish that there is any discriminatory motivation at play. The *Chase* case cited by the Tribe and Keshena is actually not a discrimination case, but rather was a preemption case regarding freedom from taxation. *Chase v. McMasters*, 573 F.2d 1011, 1018-19, n.8 (8th Cir. 1978).

The remaining Restrictive Covenants are not preempted by the Menominee Restoration Act because the MRA does not have any express language on the elimination of private property rights, and instead intended the opposite. MRA §§ 3(d), 6(c). The agreement in the Restrictive Covenants to follow the LLPOA's own rules and regulations is not preempted by the MRA.

The Restrictive Covenants' Section 1.D addressing municipal laws is also not in conflict with the Restoration Act. Section 1.D is not a municipal regulation, rather, it is a private agreement to follow the municipal regulations. The Tribe and Keshena again impose their own "intent" on the Restrictive Covenants: "clearly intended to interfere with the Congressional intent to restore the Menominee Reservation…." Resp. Br. 9. Again, the actual intent is stated in the Restrictive Covenants. R.1, Compl. 13, A-App. 015.

The fact that the Legend Lake lots are encumbered by Restrictive Covenants was the consequence of MEI selling the land to a developer, who attracted purchasers by creating a planned development protected by restrictions. The Legend Lake lots were created with the Original Covenants in place, including the condition that a mandatory association could be created to enforce the covenants. R.1, Compl. ¶4, A-App. 006; R.127, A-App. 205. LLPOA was then created and issued various bylaws, including the

2009 bylaws that included the Restrictive Covenants. R.1, Compl. ¶¶5, 9, A-App. 006-07. This history is necessary context for evaluating the Tribe and Keshena's argument that "the Tribe did not agree to these Restrictive Covenants voluntarily." *See* Resp. Br. 10. "The issue is not whether the state or County can regulate the Ranch in the future; it is, instead, whether the Ranch remains subject to voluntarily accepted contractual restrictions." *Friends of East Willits Valley v. County of Mendocino*, 101 Cal. App. 4th 191, 123 Cal. Rptr. 2d 708, 714 (Cal. Ct. App. 2002).

III. The case is ripe for a decision.

The purpose of Wis. Stat. § 806.04, the Uniform Declaratory Judgments Act, is to establish parties' legal rights. Parties to a contract "may have determined any question of construction or validity arising under" the contract. Wis. Stat. § 806.04(2). "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Wis. Stat. § 806.04(1). Judgment in this case would hardly an advisory opinion. The parties would benefit from a decision that the Restrictive Covenants are valid in the first instance, rather than relitigating this general question every time a specific dispute arises. Now that part of the Restrictive Covenants has been ruled preempted due to the litigation before the District Court, there is a need to declare the validity of the remainder of the covenants. LLPOA's arguments in this matter have consistently addressed the Restrictive Covenants in their entirety. R.1, Compl. ¶¶7, 13, 23-24, A-App. 007-08, 012-13; R.18 at 2-6; R.20, Tr. 27:19-28:5, A-App. 128-29; R.66 at 4, R.160, Tr. 11:24-12:4, A-App. 126-17; App Br. 17, 19; Supp. Br. 5. The entire LLPOA By-Laws were in the record. R.122, A-App. 179-204. The facts are sufficiently developed for the declaratory judgment requested by LLPOA.

IV. Sovereign immunity does not bar this case.

Sovereign immunity, as asserted by either the Tribe, Keshena, or the United States, does not bar this case due to Keshena's status as an individual member of the Tribe, abrogation of sovereign immunity by the MRA, waiver, and the applicability of the immovable property and in rem exceptions. This is because the MRA § 6(c) provides that transferring property "shall be subject to all valid existing rights, including, but not limited to, liens, outstanding taxes (local, State, and Federal), mortgages, and any other obligations" and "[e]xcept as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, any contractual rights rights or obligations, including existing fishing rights, or any obligations for taxes already levied." MRA §§ 3(d), § 6(c). Here, there are multiple ways for the obligation holder to bring suit to enforce these obligations.

Along with the language in the MRA, it is possible to file suit against either Mr. Keshena or the Tribe, or both, as the Tribe has waived its sovereign immunity for a limited purpose. Keshena was acting in his capacity as a member of the Menominee Tribe when he transferred the Keshena Properties to the United States, and does not have sovereign immunity in his individual capacity. The Tribe voluntarily agreed to be subject to the Restrictive Covenants when it involved itself in the trust transaction, which legally only required Keshena and the United States. If the Tribe chooses to include itself in the transaction, then the Tribe waives its sovereign immunity for the limited purpose of the required resolution of any "valid, existing rights" in the properties sought to be transferred. Otherwise, MRA Section 6(c) is rendered a nullity. Here, it is not LLPOA who is attempting to "undermine the Tribe's rights under the Restoration Act" (*see* Resp. Br. 13), rather, LLPOA seeks to give effect to one of the MRA's provisions.

If Keshena is considered to be the Tribe's agent, then the Tribe gave Keshena the apparent and actual authority to take the necessary steps to accomplish the transfers, which included accepting the properties encumbered with the existing restrictions, including the explicit waiver contained in the Restrictive Covenants. R.1, Compl. 17, A-App. 019. "Whether an agent has apparent authority to bind the principal is a factual question determined from all the circumstances of the transaction." *StoreVisions, Inc. v. Omaha Tribe of Neb.*, 795 N.W.2d 271, 279 (Neb. 2011), *modified on reh'g*, 802 N.W.2d 420 (Neb. 2011). This is supported by the minority position, cited by the Court of Appeals, that a tribe may waive immunity despite not following proper procedure. App. Br. 23 (citing Certification, 31-33, A-App. 341-42). As explained above, here the Tribe's involvement was entirely voluntary, therefore the example cases provided by the Court of Appeals are fully applicable.

In addition, the immovable property and in rem exceptions apply to bar sovereign immunity. Although the cases cited by the Tribe and Keshena did not yet apply the immovable property exception, Resp. Br. 17, the exception has long-standing recognition in common law. *Cayuga Indian Nation of New York v. Seneca County*, 978 F.3d 829, 836 (2d Cir. 2020) (citations omitted). Congress has not taken affirmative steps to remove the immovable property exception for tribal immunity, and absent such an act, the common law principle will continue to apply to tribes. The distinction in the *Timber & Wood Products* case is dispositive: LLPOA is not seeking to take possession of tribal property, therefore, the longstanding in rem exception should apply here. *See Wisconsin Dep't of Nat. Resources v. Timber and Wood Products Located in Sawyer County*, 2018 WI App 6, ¶47, 379 Wis. 2d 690, 906 N.W.2d 707. The Tribe and Keshena misconstrue LLPOA's arguments regarding the in rem and immovable property exceptions. *See* Resp. Br. 20.

The Tribe and Keshena also argue that Keshena no longer owns the properties. Resp. Br. 16. This illustrates LLPOA's argument that the United States cannot have immunity from suit in this situation, because if the United States could not be sued to adjudicate "valid existing rights," this would mean that the timing of the trust transfer would frequently moot cases filed to adjudicate rights, frustrating the intent of the MRA. LLPOA explained that the Quiet Title Act is not necessary or applicable here. App. Br. 19-20. The interest that LLPOA seeks to have adjudicated is not in conflict with the United States' interest in the properties. All of the Quiet Title Act cases referenced by the Tribe and Keshena dealt with easements, not with contracts established by private restrictive covenants. Resp. Br. 19.

V. The United States is not an indispensable party.

LLPOA did not concede that the United States was an indispensable party in the proceedings before the IBIA. *See* Resp. Br. 20-21. At the time of the briefing before the IBIA in 2019, LLPOA was referring to, and bound by, the circuit court's ruling on this issue. Resp. Supp. Br., Ex. A, ¶8, n.4.

The United States is not a necessary party under Wis. Stat. § 803.03(1) because complete relief may be afforded between the existing parties without joining the United States, since the transfer of legal title is not being challenged. *See* Wis. Stat. § 803.03(1)(a). The absence of the United States will not impair or impede its ability to protect whatever interest it may have. *See* Wis. Stat. § 803.03(1)(b)(1). This is because the Tribe can adequately protect its interests, which would be aligned with the United States. The Tribe and Keshena do not explain what the United States' interest in the "use" of the properties is or how this would be different from the Tribe's interest. *See* Resp. Br. 21. Furthermore, the United States' legal title would not be affected by judgment in this case, and therefore Wis. Stat. § 806.04 also does not require joinder of the United States. *See* Resp. Br. 24. Finally,

there is no risk of the United States' absence causing inconsistent or duplicative obligations. *See* Wis. Stat. § 803.03(1)(b)(2).

The United States is also not an indispensable party under Wis. Stat. § 803.03(3). As explained above in regard to sovereign immunity, (and as explained in LLPOA's opening brief regarding the fact that LLPOA does not need to resort to the Quiet Title Act in this situation, App. Br. 39), the United States could be made a party, but it is not necessary to do so. This action may proceed in equity and good conscience without joining the United States, because the judgment in this case would not cause prejudice to any party or the United States, and the judgment would be adequate in the United States absence. *See* Wis. Stat. § 803.03(3)(a)-(c). Judgment would not impact the United States' interest or undermine the proper administration of the Restoration Act, to the contrary, it would ensure that all provisions of the Restoration Act are followed. *See* Resp. Br. 22. As the *Lyon* case points out, there is an important distinction between a case that would "create new interests in land and attempts to have pre-existing interests recognized." *Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1069 (9th Cir. 2010). The Tribe and Keshena's question, Resp. Br. 23, on who would be responsible for paying dues in the future sidesteps the first question of how LLPOA is expected to perform the same amount of common area maintenance but with an ever-dwindling source of dues. Finally, LLPOA will not have an adequate remedy if this action is dismissed for nonjoinder. *See* Wis. Stat. § 803.03(3)(d).

VI. The Restrictive Covenants are not void.

Finally, the Tribe and Keshena bring up an argument that was not part of their motion to dismiss or the circuit court's decision that disposed of the case prior to appeal. They argue that the Restrictive Covenants violate the statute of frauds because they were not signed by the owners of the properties. Resp. Br. 24-25. This issue was raised by the Tribe and Keshena in summary judgment briefing before the circuit court, but because the Tribe and Keshena moved for reconsideration on their motion to dismiss, the circuit court decided the case on those grounds. There is no circuit court decision on this issue, the parties did not brief the statute of frauds before the Court of Appeals, and in their brief before this Court, the Tribe and Keshena devote only three pages to this issue, without referencing the extensive summary judgment record which was filed but never heard by the circuit court. It makes very little sense for this Court to decide this issue under these circumstances.

The Tribe and Keshena's argument relies on the assumption that the Restrictive Covenants are "new" restrictions rather than an extension of the Original Covenants imposed by the plats recorded in the 1960s. *See* Resp. Br. 26; R.1, Compl. ¶4, A-App. 006. The Original Covenants, which contained use restrictions, also stated, "After completion of the project, ten or more property owners may form an Association for such purpose of policing and enforcing the aforesaid covenants and for the maintenance and use of wilderness areas, outlots, and lodge." R.127, A-App. 205. Accordingly, LLPOA was created, and before the Original Covenants expired, many of their provisions were adopted into the 1998 amended bylaws. R.1, Compl. ¶¶5, 6, 9, A-App. 006-07. Then, in 2009, LLPOA amended the bylaws, via membership vote, to adopt the Restrictive Covenants. R.1, Compl. ¶12, A-App. 008. The Tribe and Keshena do not

seem to take issue with the LLPOA rule use restrictions, which are obviously related to the Original Covenants, but instead call out only the transfer restriction, and the expenses, jurisdiction, and waiver of defenses provisions. Resp. Br. 27. However, they do not develop an argument beyond a single sentence taking issue with these provisions. The Original Covenants envisioned that LLPOA was allowed to be created to police and enforce the aforesaid covenants, as well as the maintenance and use of the common areas of the development. R.127, A-App. 205.

The *AKG Real Estate* case dealt with easements, not restrictive covenants, and has little bearing on this case. *See AKG Real Estate v. Kosterman*, 2006 WI 106, ¶¶ 1-3, 14-39, 296 Wis. 2d 1, 717 NW 2d 835. LLPOA's position in this lawsuit is not anti-property rights, rather, LLPOA seeks to preserve the property rights of its members. LLPOA has shown sufficient facts to establish that the Restrictive Covenants are valid.

Conclusion

For the above reasons, and as set forth in LLPOA's opening brief, LLPOA respectfully requests that the Court reverse the order of the circuit court and remand the case for further proceedings.

Respectfully Submitted this 10th day of July, 2025.

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WIS. STAT. § 809.19(8g)(a) FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 2,983 words.

Signed: July 10, 2025.

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